Supreme Court, U.S.
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No. 97 - 632

IN THE

Supreme Court of the United States

October Term, 1997

FRANCIS E. DADDARIO,

Petitioner,

v.

CAPE COD COMMISSION

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

OPPOSITION OF RESPONDENT TO MOTION BY NEW ENGLAND LEGAL FOUNDATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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REASONS FOR OPPOSING THE MOTION

Pursuant to Supreme Court Rule 37.5, the Respondent Cape Cod Commission hereby opposes the motion dated November 7, 1997 made by the New England Legal Foundation, as counsel for various Amici Curiae,[1] seeking leave to file a brief ("Brief") in support of the Petitioner Francis E. Daddario's petition for a writ of certiorari. The Respondent states the following reasons why it withheld consent to the filing of the Brief:

1. The Brief does not "bring[ ] to the attention of the Court relevant matter not already brought to its attention by the parties"; its filing would merely burden the Court and is not favored. Supreme Court Rule 37.1. A motion for leave to file an amicus curiae brief is particularly disfavored when it is presented before the petition for writ of certiorari has been granted. Supreme Court Rule 37.2 (b). The Brief is duplicative; it addresses the same "taking" issues already presented by the Petitioner in his petition for writ of certiorari,[2] and does not offer a different perspective or place this case in a broader context.[3]

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[1] American Association for Small Property Ownership, American Policy Center, Chicago Creative Investors Association, Homeowners Against Rent Kontrols, Houston Property Rights Association, Illinois Rental Property Owners Association, Maine Conservation Rights Institute, Property Owning Women, Property Rights Foundation of America, and Virginians for Property Rights.

[2] The Amici Curiae, and their counsel, did not participate in the prior appellate review of this case by the Massachusetts Supreme Judicial Court, as they could have done under that court's procedures. See Mass. R. App. P. 17 (brief of amicus curiae may be filed by leave of appellate court). (Several amicus curiae briefs were filed at that time in support of the Respondent.) Having forgone the opportunity to express their views on an earlier occasion, the Amici Curiae now seek to support the Petitioner with little knowledge of the trial record or the proceedings before the Supreme Judicial Court.

[3] In addition to rejecting the Petitioner's regulatory taking claim on its merits, the Supreme Judicial Court found that the taking claim was not ripe. See Daddario v. Cape Cod Comm'n, 425 Mass. 411, 414-15 (1997) (Petition for Writ of Certiorari Appendix at 5a-7a). The Brief addresses the taking claim, but ignores the ripeness issue.

2. To the extent that the Brief cites cases not discussed in the petition for writ of certiorari, those cases are inapposite to the claim for which they are offered as support: namely, that Massachusetts recognizes a landowner's mineral estate as a separate estate in land, for which just compensation is due when all economic value of that separate estate is taken. (The Amici Curiae's premise that the Petitioner has been deprived of all value of the property for sand and gravel mining ignores the holding below. The Supreme Judicial Court determined that the denial of the Petitioner's mining proposal "did not preclude less extensive sand and gravel operations." Daddario v. Cape Cod Comm'n, 425 Mass. 411, 417 (1997) (Petition for Writ of Certiorari Appendix at 9a). See also Respondent's Brief in Opposition at 8.)

In the two Massachusetts cases cited by the Amici Curiae on this issue, and also in a prior case which was relied on by the court in one of those cited cases, the right to remove sand or other minerals had been transferred by the owner of the underlying property to another party. See Bates v. Commonwealth, 380 Mass. 931, 931-932 (1980) (where landowner had granted plaintiff right to enter and remove sand and gravel (rights defined as a profit à prendre), plaintiff held present interest in land and was entitled to portion of eminent domain damages); Gray v. Handy, 349 Mass. 438, 440-441 (1965) (grant of privilege to take sand from grantor's property to build cranberry bogs, roads and dikes on land conveyed to grantee was a profit à prendre, appurtenant to grantee's dominant estate); Hunt v. Boston, 183 Mass. 303, 305 (1903) (landowner may convey complete ownership of portion of estate, such as mines and quarries, while retaining general ownership of whole tract for other purposes, but conveyed right ceased to have separate existence after tax sale of underlying property). By contrast, in the case at hand, the Petitioner owned the property in fee simple, and whatever mining rights he possessed inhered

in his title: the right to mine sand and gravel had never been identified as a separate property interest (at least, not until the Petitioner sought to establish a basis for a taking claim), nor had it been conveyed as a separate interest. The cases cited by the Amici Curiae involve separate ownership of a "strand" that had previously been part of the entire "bundle" of a landowner's property rights, and those cases are not relevant, therefore, to determining if compensation is due when a fee owner is precluded from using his land for one purpose, while retaining the right to put the land to other beneficial uses.

This Court has stated clearly that a property owner's rights are viewed in their entirety when evaluating a regulatory taking claim. See Andrus v. Allard, 444 U.S. 51, 65-66 (1979) ("At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety"); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130 (1978) ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated"). The Brief simply ignores precedents the Amici dislike.

3. In order for this Court to consider the Petitioner's claim, which is based on the supposed existence of a separate mineral estate, the Court would have to determine the extent to which Massachusetts property law recognizes and protects mineral rights, owned as part of the fee simple, as a separate property interest, a topic not addressed in the Supreme Judicial Court's decision. (Respondent's Brief in Opposition at 6, n.4.) As demonstrated by the cases discussed in Paragraph 2, supra, Massachusetts property law offers no support for treating mineral rights

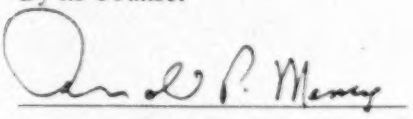
which have always been part of a fee simple as a separate, unrelated estate once a taking claim is asserted.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court deny the motion by the New England Legal Foundation, as counsel for Amici Curiae, for leave to file a brief in support of the petition for writ of certiorari.

Respectfully submitted,

CAPE COD COMMISSION
By Its Counsel



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